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No. 88-1347

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

Gary Green,

Petitioner,

v.

Maurice P. Foley,

Respondent.

PETITIONER'S REPLY BRIEF

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DISCUSSION

THE FOURTH CIRCUIT'S DECISION WARRANTS REVIEW BECAUSE IT IS CONTRARY TO THIS COURT'S RULINGS AND SERIOUSLY UNDERMINES THE EFFICACY OF THE SUMMARY JUDGMENT PROCEDURE

The Fourth Circuit deprived Petitioner, Gary Green, of his right to a hearing on the merits of his complaint by resolving against him factual issues never litigated at the trial court level and raised for the first time after summary

judgment had been granted in his favor.

Petitioner's complaint sought to enforce two agreements by which Respondent Foley guaranteed loans made to a partnership in which Foley was a principal. The district court dismissed the complaint with regard to one note (the Mount Vernon note), however, it granted Green summary judgment under Federal Rule of Civil Procedure 56 on the other note (the Sovran note).

Thereafter, Foley filed a Motion to Vacate Summary Judgment and Grant Rehearing and Reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Foley argued, inter alia, that a document he obtained through discovery on the day of the court's hearing[1] of the

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[1] Despite the fact that this document was produced four days before the response date provided by the Federal Rule of Civil Procedure 34, Respondent complains that the document was not

summary judgment motion created a material issue of fact as to Green's status as a purchaser of the notes. The district court denied Foley's motion two days later, without a hearing.

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produced early enough, and that its production was the result of a mistake. Br. in Opp. at 8, n.2. Green's attorney at the time did, indeed, say: "the reason the letter was produced was because I in error allowed it to be produced . . . ." Ap. 17a (emphasis added). This statement has been used by both the Respondent and the Fourth Circuit to support the conclusion that "Green had no intention of disclosing the true manner in which he obtained the notes. . . ." App. 17a. There is, however, absolutely no direct evidence in the Record before the court of appeals to establish Green's intent; Green never testified and he was not deposed. Contrary to Respondent's argument, a conclusion regarding the intent of a party is a classic issue of fact; and the court of appeals clearly relied upon its determination in this regard to support its conclusion that Green's claim was fraudulent. The Fourth Circuit's treatment of this issue vividly illustrates the extent to which it strayed from the principles enunciated by this Court in such cases as Adickes v. S.H. Kress & Co., 388 U.S. 144 (1970), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

While the case was pending on appeal, Foley filed a second post-judgment motion pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure. Foley argued that subsequent deposition testimony in the state court proceeding on the Mount Vernon note proved that the Sovran note had been discharged pursuant to Va. Code Ann. Sec. 8.3-803. The district court denied this motion as well.

On Foley's consolidated appeals, the Fourth Circuit reversed the district court, but rather than remanding the case for further proceedings, it directed that summary judgment be granted against Foley on the ground that the note had been discharged. The decision of the Fourth Circuit rested on its factual determination that partnership funds had been used to acquire the notes on Green's behalf, a subject on which Green had never been

heard. In so doing, the Fourth Circuit transformed the case into an "appellate trial" in which the only evidence was that offered by Foley in support of his two post-judgment motions.[2] Until that time, however, the issue was never whether summary judgment would be entered for Foley, but whether Green's judgment would be re-

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[2] Foley's case rested on excerpts of a deposition transcript from another proceeding. Petitioner has here provided the Court, as Appendices L through R, with all of the countervailing evidence presently available as a result of parallel proceedings involving these same parties. Respondent has characterized these materials as "misleading." Br. in Opp. at 7, 13. It is beyond comprehension that these materials can be any more "misleading" in a substantive sense than were the partial transcripts submitted to the court of appeals by Foley himself. It is for a trial court to ascertain the facts, including which facts are "misleading." Moreover, contrary to the assertion of the Respondent, Petitioner specifically noted that these portions of the Appendix were not part of the Record below and specifically requested leave to supplement the Record, Petition at 17, n.14.

opened.

Respondent emphasizes that the Record before the court of appeals was "uncontroverted."[3] The case, however, had proceeded only so far as Green's motion for summary judgment; Green was under no obligation to put on his entire case. Indeed, Rule 56 only obliged him to present legal arguments and uncontested facts. Green had neither cause nor opportunity to con-

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[3] The Joint Appendix, however, is not a stipulation that all of the material contained therein was true and "uncontroverted." The parties to any appeal are admonished to cooperate in constructing an appendix, but that does not mean that one party, by cooperating in the designation of an appendix, thereby admits as true the statements in the documents. The fact that Green's prior counsel was obliged to argue on the Record as it existed does not mean that Green conceded that the post-judgment evidence submitted by Foley was uncontroverted. Foley's reliance on Rule 10(e) and Fourth Circuit I.O.P. 10.4 are irrelevant -- all those rules do is perfect a record with existing information that <u>should</u> originally <u>have</u> been in the record; they are not a means by which to try new issues on appeal.

trovert the evidence (submitted by Foley in support of his two post-judgment motions) upon which the Fourth Circuit based its decision -- on both post-judgment motions he prevailed. The issue before the district court was whether Foley had alleged any facts which were sufficient to warrant re-opening the case. By ruling that the evidence offered by Foley did not warrant relief pursuant to either Rule 59 or 60, the district court closed the record without any evidence being presented by Green. But rather than remand the case for further proceedings, the court of appeals then acted without giving Green a chance to tell his side.

This court has recognized and forbidden this kind of procedure in a series of cases beginning with Fountain v. Filson, 336 U.S. 681 (1940). Respondent attempts to distinguish Fountain and its

progeny; however, the discussion merely points out a distinction without a difference. Fountain and the cases which follow from it stand for the principle that a party cannot be deprived of the right to a trial to meet an alleged defect in its case identified for the first time by a court of appeals. The circumstances in which that issue arises here differ in no material way from those which have gone before, and the principle is the same. In all federal courts "great care must be exercised to assure that the original movant has had an adequate opportunity to show that there is a genuine issue and that his opponent is not entitled to judgment as a matter of law." 10A C. Wright, A Miller & M. Kane, Federal Practice and Procedure: Civil 2d § 2720, at 34 (1983). Contrary to the assertions of Respondent, this case has significance

far beyond the parties to this case. If allowed to stand, the decision of the Fourth Circuit will undermine the efficacy of Rule 56.[4] Parties will either be discouraged from utilizing the summary judgment procedure or encouraged to buttress their motion with such extensive factual support on all issues, including those counsel knows are controverted, that the utility of the procedure will be lost.

Nor is the decision of the Fourth Circuit an isolated event. It is becoming increasingly apparent that in the forty years since Fountain federal courts have drifted from its teachings. In the last two years alone, this Court has been presented with at least three other petitions for certiorari involving this

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[4] The importance of Rule 56 in this scope of judicial administration has recently been reiterated by this Court. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

same issue.[5]

CONCLUSION

For the reasons set forth above, Petitioner prays that a writ of certiorari issue to review the judgment and opinion in this case of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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[5] Murabayashi v. Honolulu Federal Savings & Loan Ass'n, 848 F.2d 1243 (9th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1173 (1989); Potenze v. New York Shipping Ass'n, Inc. 804 F.2d 235 (2d Cir. 1986), cert. denied, ____ U.S. ___ 107 S.Ct. 1955 (1987) (No. 86-1462); Federal Savings & Loan Ins. Corp. v. Angell, Holmes & Lea, 838 F.2d 395 (9th Cir.), cert. denied sub nom., Van Voorhis & Skaggs v. Federal Savings & Loan Ins. Corp., ___ U.S. ___, 109 S. Ct. 127 (1988) (No. 88-4).